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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1422

PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION, LEWIS J. ENGMAN, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., individually and as Commissioners of the Federal Trade Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on November 20, 1972.

Opinions Below

The opinion of the court of appeals is officially reported at 472 F.2d 179 (2d Cir. 1972) and is unofficially reported at 1972 Trade Cas. ¶ 74,260 (2d Cir. 1972). The opinion of the district court is officially reported at 343 F. Supp. 396 (S.D.N.Y. 1972) and is unofficially reported at 1972 Trade

Cas. ¶ 74,036 (S.D.N.Y. 1972). The opinions of the court of appeals and the district court are respectively set forth in Appendices A and B to this petition.[1]

Jurisdiction

The judgment of the court of appeals was entered on November 20, 1972 and is set forth in Appendix E hereto. The time within which to petition for a writ of certiorari was extended to April 19, 1973 by order of Justice Marshall entered on January 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the court below was in error in holding: (a) that soft drink bottlers are not entitled to the same standards of due process which concededly would apply in antitrust litigation if brought by anyone other than the government, and (b) that proceedings which jeopardize bottlers' property rights and are designed to restructure their industry can be prosecuted against their franchisor without joinder of the bottlers as parties.

2. Whether the court below was in error in holding that the bottlers may be bound not only by a cease and desist order against their franchisor, but also by mandatory obligations to be imposed on them by an adjudication in which they have not been joined as parties or served with process.

3. Whether, in holding that every bottler will have a right to judicial review in the district court of his choice of any FTC order, the court below disregarded the intent

[1] References to pages within the Appendices will hereinafter be cited with the suffix "a" (*e.g.*, 1a).

of Congress to confine judicial review of Federal Trade Commission orders to a single court of appeals.

4. Whether it is contrary to public policy to permit agency proceedings, which threaten to restructure an entire industry, to go forward for years without conclusively resolving the threshold question of who are the proper defendants.

Constitutional Provisions, Statutes and Rules Involved

The Constitutional provision involved here is the due process clause of the Fifth Amendment to the United States Constitution. District court jurisdiction is conferred by Sections 1331(a), 1337, 1361 and 1651 of the Judicial Code, 28 U.S.C. §§ 1331(a), 1337, 1361 and 1651, and Sections 10(c) and (e) of the Administrative Procedure Act, now 5 U.S.C. §§ 704 and 706. Other relevant provisions are Section Five of the Federal Trade Commission Act, 15 U.S.C. § 45, and Rule 19 of the Federal Rules of Civil Procedure. These provisions are printed in Appendix F hereto.

Statement of the Case

The principal issue in this case is whether a government agency may lawfully institute adjudicatory proceedings to destroy contract and property rights by joining as a defendant the grantor of those rights, but not the grantees. The court below and the FTC have conceded that such a suit could not be prosecuted by a private litigant. The question squarely presented is whether a lesser standard of due process applies to suits brought by the federal government.

This issue directly affects the right to due process of some 2700 companies (every franchised soft drink bottler in the United States)[2] and has indirect application to every company which has been granted rights under a franchise or license agreement. The issue arises in antitrust actions brought by the Federal Trade Commission ("the Commission" or "the FTC") against the major soft drink franchisors to declare invalid the exclusive territories granted by them to independent bottlers, none of whom has been joined as a party by the FTC.[3]

The Rights at Stake in the FTC Proceeding

Petitioner is one of 513 *Pepsi-Cola* bottlers in the United States, operating in a geographically defined territory pursuant to a trademark license (franchise agreement) with PepsiCo, Inc. ("PepsiCo"). The franchise agreement provides that, in return for establishing a manufacturing plant and developing a market for the product, petitioner shall have the exclusive right to make and sell *Pepsi-Cola* in the territory of Corvallis, Oregon. Similar franchise agreements have been entered into by PepsiCo and its major competitors with other bottlers throughout the United States over a period of more than fifty years.

The franchising route taken by PepsiCo beginning in 1908, and by its competitors in the soft drink industry both

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[2] In briefs below, the Government claims that there are more than 2700 bottlers in the United States who would be directly affected by the outcome of the issue raised herein. Brief for Appellees at 3.

[3] In the Matter of PepsiCo., Inc., Dkt. No. 8856; In the Matter of Crush International Ltd., Dkt. No. 8853; In the Matter of Dr. Pepper Company, Dkt. No. 8854; In the Matter of The Coca-Cola Company, Dkt. No. 8855; In the Matter of The Seven-Up Company, Dkt. No. 8857; In the Matter of The Royal Crown Cola Company, Dkt. No. 8858; In the Matter of National Industries, Inc., Dkt. No. 8859; In the Matter of Norton Simon, Inc., Dkt. No. 8877.

before and after that date, was the only means by which national manufacture and marketing of bottled soft drinks became feasible. Capital investments beyond the capabilities of any franchisor were required for plants and equipment to bottle and sell soft drinks in every local area across the nation. The initial cost of returnable bottles, which were the only economically feasible soft drink containers until after World War II,[4] exceeded the cost of the product itself and dictated the structure of the industry. Bottlers had to have exclusivity, not only to survive against bottlers of competing brands, but also to recapture and obtain sufficient re-use of their own bottles to make their operations economically viable.

Petitioner became a bottler, built a plant and bought equipment for manufacture and sale of *Pepsi-Cola* in Corvallis upon the strength of the covenant in its franchise agreement that gave it exclusive rights for that trademarked product as against all others, including PepsiCo (R 8, pp. 5-6, 13-14).[5] So did 512 other *Pepsi* bottlers and thousands of competing brand bottlers in towns and cities throughout the United States, thus establishing the structure for national marketing of quality-controlled soft drink beverages.

Despite the fact that franchise agreements similar to those of petitioner had been repeatedly sustained by the courts during the past half century,[6] the FTC instituted proceedings against the franchisors in July, 1971, seeking

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[4] Returnable bottles are still the leading container for soft drinks and are the most inexpensive package, both from an economic and an ecological standpoint.

[5] Citations to documents in the Record herein are in the form "R —, p. —."

[6] See Coca-Cola Bottling Co. v. Coca-Cola Co., 269 F. 796 (D.Del. 1920); Brosious v. Pepsi-Cola Co., 155 F.2d 99 (3d Cir. 1946); Jones v. Pepsi-Cola Co., 223 F. Supp. 650 (D.Neb. 1963).

to invalidate those agreements. The complaints allege that the grant to petitioner (and all other franchised bottlers) of an exclusive territory violates Section Five of the Federal Trade Commission Act, 15 U.S.C. § 45, and the demand for relief is that such exclusivity be eliminated.

If this relief were to be granted, returnable bottles would be driven from the market along with the many small bottlers who make their use feasible.[7] The relief sought by the FTC would result in a restructuring of the industry in which territories now served by small bottlers would become the provinces of a relatively few large ones, among which would be the franchisors.[8] Although the bottler is clearly the principal target of the FTC and has distinctly different interests from those of his franchisor in preservation of the market as now structured, neither petitioner nor any other bottler has been joined as a party in the FTC proceeding or served with a copy of the complaint.

The FTC's Rejection of the Indispensable Party Defense

On October 12, 1971, PepsiCo, which had pleaded lack of indispensable parties as an affirmative defense, moved before the Hearing Examiner ("the Examiner") to dismiss the complaint or join the bottlers as parties respondent.[9] On January 20, 1972, the Examiner denied the motion. He found that the "substantial property rights these bottlers

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[7] Bottlers would be forced by the economics involved to sell only cans or non-returnable bottles for shipment either directly or through warehouses into other territories; only large, economically powerful bottlers would have that capability (R 3, pp. 65-66).

[8] The FTC Staff has conceded this point by proposing a "Metro Area Bottler Handicap" Plan, the sole purpose of which is to delay *temporarily* the demise of the small bottlers. This Plan is discussed at pp. 9-10, *infra*.

[9] The Examiner's order is reproduced in Appendix D hereto.

have acquired and own" could be adversely affected and that *"the bottlers may be considered indispensable"* [10] but concluded that "as a practical matter it is not feasible to attempt to join all of the respondent's bottlers as parties to this proceeding." [11] The Examiner noted that the right to intervene had been granted to an association representing 512 of the 513 *Pepsi* bottlers in the United States and that while such intervention did not give the association the status of a "party", bottlers were being given some opportunity to participate.[12]

On March 23, 1972, the Commission affirmed the Examiner's decision and refused to suspend the FTC proceeding because of non-joinder of bottlers on the ground that under the antitrust laws "little, if any notice" of rights of third parties need be taken (44a).

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[10] 53a (emphasis added).

[11] "It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondent has with its bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondent's trademarked products, it would be without recourse to sue the respondent for damages or for injunctive relief requiring it to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.

As a practical matter, however, it is not feasible to attempt to join all of the respondent's bottlers as parties to this proceeding. * * *" (53a-54a).

[12] Three *Pepsi-Cola* bottlers and the Pepsi-Cola Bottlers' Association ("the Association") have intervened before the FTC (R 3, pp. 48, 59). The Association moved to intervene, not as representative of any possible class of bottlers, but rather to adduce "general proof" (*id.*, p. 63). The Examiner has suggested that other bottler interventions would be permitted.

The District Court Action

PepsiCo then filed suit in the Southern District of New York for declaratory and injunctive relief against continuation of the FTC proceedings in the absence of the bottlers.[13] Petitioner intervened as a plaintiff in the action.

The district court (Cannella, J.) took "no position on the issue of indispensable parties", but dismissed the complaint for lack of subject matter jurisdiction. The court held that "• • • plaintiff [*sic*] has not exhausted its administrative remedies", a decision which it characterized as "in accord" with one in the Northern District of Georgia involving Coca-Cola Company and certain bottlers.[14]

Summarily rejected in a footnote were the due process claims of petitioner. The court commented only that it "does not agree" with petitioner's point that the Georgia decision is inapplicable here because unlike the *Coca-Cola* bottlers there, he is a non-participant before the FTC and therefore has no administrative remedies to exhaust.[15] The

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[13] PepsiCo, Inc. v. Federal Trade Commission, et al., 72 Civ. 1770 (S.D.N.Y. filed April 28, 1972). The defendants are the Federal Trade Commission and its five individual members, one of whom resigned after judgment was entered in the court of appeals. His successor has been substituted as a respondent in this Court pursuant to Supreme Court Rule 48 (3).

[14] 33a, *citing* Coca-Cola Co. v. FTC, 342 F. Supp. 670 (N.D. Ga. 1972), *aff'd*, 1973 Trade Cas. ¶ 74,360 (5th Cir. 1973). Appeal is pending in the Eighth Circuit from a decision denying a similar indispensable party motion in Seven-Up Co. v. Goodhope, 349 F. Supp. 551 (E.D. Mo. 1972), Dkt. No. 72-1680 (8th Cir.).

[15] 33a n.4. All parties before the Georgia district court were either parties or intervenors in the FTC proceeding and arguably had *some* administrative remedies left to be exhausted. Petitioner is not an intervenor in the FTC proceeding.

The Georgia district court decision was affirmed by the Fifth Circuit after a divided panel of the Second Circuit handed down its opinion affirming Judge Cannella's order. Reasoning that a named defendant's interest in being protected from multiple litigation

district court also noted in passing that bottlers could intervene in the FTC case with certain rights, although they would not have the right "to appeal any action taken by the FTC." [16]

The "Metro Area Bottler Handicap"

Both PepsiCo and petitioner filed notices of appeal to the United States Court of Appeals for the Second Circuit. Shortly thereafter, complaint counsel moved before the Examiner for partial summary decision on a theory of per se illegality. In an effort to diminish the injury which loss of exclusivity would inflict on petitioner and other small bottlers, complaint counsel proposed that for ten years "large" bottlers be restrained from selling soft drinks in territories of "small" bottlers,[17] "either directly * * * or

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and inconsistent decrees was recognized as a principle of equity and not as a constitutional right, the Fifth Circuit concluded that the *Coca-Cola* case fit within none of the narrow exceptions to the exhaustion requirement available in that circuit. The circuit court appeared to realize, however, that none of the parties before it had standing to raise the due process rights of non-joined bottlers such as petitioner herein:

> "In part, plaintiffs' argument is grounded not on a right unequivocally vested in them by statute but on asserted constitutional rights of third parties, namely the non-joined bottlers' respective rights to due process. It is always refreshing when giant corporations evince solicitous regard for others' rights—and we have learned to expect refreshment from The Coca-Cola Company—but it is no occasion for judicial review of interlocutory agency decisions. * * *" Coca-Cola Co. v. FTC, 1973 Trade Cas. ¶ 74,360 at 93,678.

[16] 32a n.2.

[17] "* * * [T]he large bottlers now doing business in the 200 largest metro areas * * * for 10 years [would be] limited to selling in metro areas and forbidden to sell in any non-metro areas which such large bottlers do not presently serve * * *. Thus small bottlers located adjacent to a metro area would be freed to sell into that metro area without concern that the metro bottler can retaliate by selling into the small bottlers' territory." Memorandum of Complaint Counsel in Support of Motion for Partial Summary Decision, p. 17 (R 23, p. 34).

thru [*sic*] * * * customers for resale by them." [18] Government counsel stated that this "Metro Area Bottler Handicap" was designed to "assure the competitive viability of smaller bottlers" and permit them a transition period in which to

> "accommodate themselves to this new marketplace environment without having to face competition from large bottlers." [19]

On April 5, 1973, the Examiner denied the motion for summary decision in the *Coca-Cola* case[20] without commenting on the Handicap proposal, other than to note the need for a full record before reaching "a conclusion that would result in a fundamental restructuring of a very substantial industry".[21]

The Court of Appeals' Decision

Although the court below divided sharply over its decision to affirm the district court, the majority and the dissent were in agreement on the following major points: (a) that the FTC threatens "a complete restructuring of an industry",[22] (b) that bottlers' "contract rights are at stake" [23] and (c) that bottlers have "fundamental rights * * * to be

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[18] *Id.* at 16 (R 23, p. 33).

[19] *Id.* By this extraordinary proposal the Government concedes that the relief it demands would have injurious impact on bottlers, would result in restructuring of the industry (creating a "new marketplace environment") and would create conflicts of interest between large bottlers on the one hand and small bottlers on the other.

[20] At the time of the printing of this petition no decision had been entered on complaint counsel's similar motion in the *Pepsi* case.

[21] Order Denying Motion for Partial Summary Decision, FTC Dkt. No. 8855 at 4.

[22] 13a (majority), 21a (dissent).

[23] 7a-8a (majority), 24a (dissent).

heard in opposition" to the complaint.[24] The panel below differed only on the way in which those "fundamental rights to be heard" should be provided.

Even on this issue there was a measure of accord. Both majority and dissent agreed that if this were a civil proceeding involving only private rights, the bottlers would have to be joined as indispensable parties.[25] The conflict between the two opinions thus turns on the narrow legal question of whether a lesser standard of due process should apply where a government agency is the plaintiff.

The majority (Friendly, C.J. and Anderson, J.) answered this question in the affirmative, holding that the public interest in enforcing the antitrust laws is so overriding that an opportunity to intervene may be substituted for the right to service of process and the status of a party which would otherwise be required by the Fifth Amendment.[26]

The dissent (Medina, J.) deplored the majority's substitute for the Fifth Amendment as judicial "corner-cutting" and called for joinder of bottlers " * * * as a matter of sound judicial administration, as a matter of consitutional law and as a matter of plain common sense." [27]

The Majority's Assumptions

In embracing intervention as a substitute for joinder, the majority assumed first, that all bottlers have had or will have some notice of the FTC's claims even though they have never been served with process and second, that intervention would give bottlers more or less all the rights of parties.

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[24] 18a (majority), 25a-26a (dissent).

[25] 6a-7a, 18a n.13 (majority), 27a-30a (dissent).

[26] 7a-8a, 14a.

[27] 28a, 20a.

The record is devoid of factual support for the first assumption.[28]

The second assumption was based only on an a priori extrapolation from the agency's Rules of Practice. Although the Rules do not give intervenors rights to make motions or argue orally, the majority concluded that this was no problem since "[w]e * * * have no cause to think that, * * * the Examiner would prevent them from doing so."[29] A "more serious question" was posed by the fact that the Rules are "ambiguous on whether an intervenor is a party" and whether he could "appeal to the Commission from the Examiner's initial decision."[30] The majority answered this by simply admonishing the Commission that it "would withhold such a right at its peril in a case such as this where the intervenors are persons whose contract rights are at stake."[31]

Having thus placed an unwarranted gloss on the agency's Rules of Practice, the majority next resolved the matter of judicial review by concluding that the right of "intervenors" to appeal to a court of appeals from a cease and desist order, although "somewhat less clear" than Pep-

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[28] In making this assumption, the majority apparently relied entirely on the fact that "[a]ll but one [bottler] are members of the Bottlers' Association, and Bottler No. 513 would have to possess a naiveté not normally encountered in business affairs not to be aware of this proceeding which has been so extensively publicized *and so vitally affects the structure of the industry* * * *." 8a n.5 (emphasis added).

[29] 7a.

[30] 7a; *but see* 7a n.3, where the court below pointed out that the Examiner has stated that "intervenors would *not* be parties" and would have to "seek leave" from the Commission to intervene on appeal (emphasis added).

[31] 7a-8a; in a footnote, the court below went on to suggest that all agencies "could well consider revision of their rules on intervention" to conform to the conclusions reached by it. 8a n.4.

siCo's, "is clear enough".[33] If PepsiCo appealed an adverse decision, the "bottlers" would have an effective right of appeal since "a court of appeals would surely allow the bottlers to intervene."[34] If PepsiCo did not appeal, the bottlers would have some kind of right to judicial review under the APA, which provides for district court review by persons "adversely affected or aggrieved by agency action * * *", "although", Judge Friendly conceded, "courts have not always appreciated this."[34]

Finally, the majority dismissed PepsiCo's risk of multiple litigation as "supposititious", since an FTC order would "bind" all bottlers who (by intervention) have an opportunity to be heard.[35]

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[32] 10a; although in one sentence the court below referred to appeals by "intervenors", the remainder of its dissertation dealt with rights to appeal of "bottlers"—"whether or not they had been full-fledged parties before the FTC"; it is not clear whether the distinction between intervenors and bottlers (most of whom are not intervenors) was inadvertent.

[33] 10a.

[34] 10a, *citing* 5 U.S.C. § 702.

[35] 17a-18a.

The Dissent's Response

The dissent took issue both with the initial premise that intervenors' rights to be heard would be adequately protected and with the ultimate conclusion that non-intervenors could constitutionally be bound. Judge Medina found the premise to be contrary to the plain meaning of the Examiner's order and inconsistent with the FTC's rules:

> "The rulings of the Commission relative to intervention are in my opinion inadequate and illusory. That the rights of those permitted to intervene are limited is apparent on the face of the order * * *. We can read, and the order does not provide for 'full participation.' Those permitted to intervene do not have the right to make motions or argue orally as guaranteed to parties * * *. FTC rules only permit a party to appeal an initial decision * * * and, as noted by Judge Cannella, these intervenors have no right of judicial review. It is, I think, no answer to say that an Appellate Court will probably permit them, on motion, to intervene. In these days of congested calendars some Appellate Courts are not always so accommodating." [36]

The dissent found the conclusion that non-intervenors could be bound because they had an opportunity to intervene to be unconstitutional. The point that could not be "swept under the rug" [37] was that the bottlers were not actually or constructively before the FTC:

> "The lack of notice to the bottlers and the failure to provide them with an effective hearing raise consti-

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[36] 24a.

[37] 25a.

> tutional questions. * * * The plain fact is that no formal notice of any kind has been given by the FTC to PepsiCo's 513 bottlers. * * * It is strange doctrine to me that constitutional requirements of notice and a fair hearing are complied with if the persons entitled to notice are members of a trade association that has moved to intervene in the proceeding. * * * "[38]

The Association's presence in the proceedings was of no significance with respect to the rights of individual bottlers because the interests of many of the bottlers were "adverse to one another."[39]

If there could be any doubt about the merits of the indispensable party argument, the Metro Handicap made it "impregnable":[40]

> "The 'Metro' provision goes much further than an order compelling PepsiCo to 'cease and desist' from enforcement of certain features of the contracts with the bottlers. The 'Metro' clause not only voids some of the contractual rights of the absent parties but imposes new obligations upon the parties to these contracts. * * * Thus it is proposed that by agency action new contracts be created and imposed upon an entire industry, although the interested parties are not represented in the adjudicatory process."[41]

The question which this Court is asked to consider is whether an agency should be permitted to proceed to take

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[38] 25a-26a (footnote omitted).

[39] 26a.

[40] 25a.

[41] 25a.

action to restructure an industry when there is no impediment to joining the interested parties.

REASONS FOR GRANTING THE WRIT

I.

Whether Minimal Due Process Requirements For Entering Judgments, Mandatory Or Otherwise, Which Are Binding In Personam Should Be Relaxed Simply Because A Government Agency, Rather Than A Private Litigant, Brings Suit To Enforce A Regulatory Statute Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Decided By This Court.

The court below recognized that were the FTC proceeding a suit between private parties, all bottlers subject to the Commission's process would have to be joined before the suit could proceed. 6a-7a, 18a n.13. *See also Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 116-25 (1968); *Western Union Tel. Co.* v. *Pennsylvania,* 368 U.S. 71 (1961); *Gregory* v. *Stetson,* 133 U.S. 579 (1890); *Shields* v. *Barrow,* 58 U.S. (17 How.) 130 (1854); Fed. R. Civ. P. 19(a).

The court below reasoned that a less exacting standard of procedural due process is permissible when contract rights are adjudicated by a federal regulatory agency which has found that joinder would be difficult, but not that it would be impossible. That rationale has never previously been applied by this Court.

The court below cited no compelling governmental interest which could justify the non-joinder of bottlers over whom the FTC has jurisdiction. This Court has not yet decided that the federal government is free to disregard the property rights of private persons merely because

recognition of those rights might complicate administrative proceedings.[42]

The cases relied on by the court below do not support any such novel and far-reaching principle. In *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), for example, the question of joining indispensable parties was neither raised nor discussed.[43] In *Schwinn* and in the other antitrust cases cited[44] there had been no finding, as there has been by the Examiner in this case, that "substantial property rights" of the absent parties to a contract could be destroyed by an adverse decision. In at least one of these cases[45] the license involved was terminable at will. In another[46] the absent parties were foreign nationals immune to the process of a United States court, and for that reason were not indispensable to the adjudication of the issues.[47]

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[42] For the reasons indicated on Point III, *infra*, compliance by the Commission with the Second Circuit's statements concerning intervention and appeals by bottlers could ultimately make disposition of the proceedings far more difficult than if all bottlers were joined as parties at the outset.

[43] This issue was also neither raised nor discussed in United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), or United States v. Univis Lens Co., 316 U.S. 241 (1942).

[44] Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

[45] Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940).

[46] United States v. National Lead Co., 63 F. Supp. 513 (S.D. N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

[47] As Judge Rifkind explained in *National Lead:*

> "Were the rule advocated by [a United States defendant] allowed to operate in the field of restraints upon the foreign commerce of the United States, it would paralyze the enforcement of the law in all cases where one or more of the parties to the conspiracy was an alien corporation over whom the court could acquire no personal jurisdiction. • • •" (63 F. Supp. at 525 n.8).

In no antitrust case has it been held that absent persons did not have to be joined in any, let alone all, of the circumstances that exist in this case: where (1) there has been a finding that substantial property rights of the bottlers are involved; (2) there has been no finding that joinder of the bottlers would be impossible; (3) the legality of the challenged provisions may ultimately turn on their effects on individual bottlers in their particular marketing areas;[48] and (4) the relief sought in the proceeding would impose mandatory obligations on the bottlers.

As Judge Medina correctly noted in the court below, the impact of the Commission's proceeding to restructure the soft drink industry "goes much further than an order compelling PepsiCo to 'cease and desist' from enforcement of certain features of the contracts with the bottlers."[49] Under the Metro Area Bottler Handicap the larger bottlers would not only lose their exclusive rights to a particular territory but would be placed under a *mandatory* obligation not to sell soft drinks in certain areas of the country or even to sell to customers who would ship into those areas.

It is clear from the recent decision of this Court in *United States* v. *Glaxo Group Ltd.*, 93 S.Ct. 861 (1973), that no such "mandatory" obligation can be imposed without joinder of the bottlers. In *Glaxo*, this Court held compul-

[48] The Examiner, in denying complaint counsel's motion for partial summary decision, has ruled that the case cannot be decided on a per se basis, and that evidence with respect to individual bottlers is essential in determining the legality of the restrictions. Order Denying Motion for Partial Summary Decision, FTC Dkt. No. 8855 at 3-4. This conclusion is clearly correct. *See* Albrecht v. Herald Co., 390 U.S. 145, 155-56 (1968) (Douglas, J., concurring); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 385-89 (1967) (Stewart, J., concurring and dissenting); United States v. Hearst Corp., 1972 Trade Cas. ¶ 74,161 (S.D.N.Y. 1972).

[49] 25a n.1.

sory licensing of a patent to be necessary because, *inter alia*, non-party licensees could not be forced to abide by the terms of an order directed against the patentee:

> "• • • The licensees, of course, are not parties to this action, and a mandatory-sales order would not affect them. • • •" (93 S.Ct. at 868).

Non-party trademark licensees, such as the bottlers involved herein, can be subjected to no different standards of due process than the non-party patent licensees in *Glaxo*; obviously the decision of the court below, rendered before this Court's decision in *Glaxo*, was in error in its conclusion that the absent bottlers would be bound by the results of the FTC proceeding.

The Commission proceedings to restructure the bottling industry are significantly different from those involved in the "public rights" cases principally relied on by the court below, *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938). The absent parties in those cases were not required to assume any new obligations as the result of the agency's order. There was no finding in those cases, as there has been by the Examiner in this case, that absent persons' "substantial property rights" and economic interests would be affected by an order adverse to the named respondent. Indeed, in the *National Licorice* case none of the absent employees came forward to argue that the order "affects his contractual rights or casts a cloud on them." (309 U.S. at 370 (separate opinion of Justices Douglas and Black)).

The opinion of the court below extends far beyond this Court's holding in either *National Licorice* or *Consolidated Edison*. The court below held that the bottlers could be bound in personam by an order affecting their property rights. In *Consolidated Edison* and *National Licorice*, how-

ever, this Court held that the absent parties (a labor union and individual employees, respectively) were not indispensable parties and did not have to be joined precisely because the orders directed against an employer had not impaired their contract rights. *National Licorice Co.* v. *NLRB*, 309 U.S. at 365-66, 369-70 (separate opinion of Justices Douglas and Black); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. at 233-38.

Unlike the bottlers, moreover, the absent parties in *National Licorice* could not have been joined as parties in the administrative proceedings. The jurisdictional statute, Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), empowered the Board to serve complaints only upon a person who "has engaged in or is engaging in" an unfair labor practice. The Board did not contend that the employees in *National Licorice* had participated in unfair labor practices; the theory of the complaint was that they had been victims of unfair labor practices rather than perpetrators. The "public rights" sought to be vindicated by the Board were the very rights granted to the employees by the National Labor Relations Act.

No similar constraints prevent the Commission from joining the bottlers. The bottlers are all located within the United States and are thus subject to the Commission's process. If the Commission can serve a complaint on PepsiCo because it has "reason to believe" that PepsiCo is using an unfair method of competition by granting exclusive territories to its bottlers,[59] a fortiori it can serve a complaint on the bottlers who have complied with their contracts.

In effect, this Court held in *Consolidated Edison* and *National Licorice* that the absent persons were no more

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[59] *See* Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b).

than conditionally necessary parties—parties who could not be joined in the agency proceedings but whose property rights were not so inextricably intertwined with the relief sought that the proceedings could not go forward in their absence. *See* Fed. R. Civ. P. 19(b). This Court has never decided, however, that agency proceedings may go forward in the absence of conditionally necessary parties who *can* be joined as parties. *See* Fed. R. Civ. P. 19(a). Nor has this Court decided that a person whose property rights are threatened in agency proceedings is nothing more than a conditionally necessary party. The court below, however, incorrectly decided not only that the Commission's proceeding to restructure the soft drink industry could proceed in the absence of indispensable parties who could be joined, but also that the indispensable parties would be bound in personam by the result of that proceeding.

II.

Whether Intervention And Some Right Of Appeal Can Serve As Substitutes For Joinder Of Indispensable Parties Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

A. *Voluntary Intervention Is Not A Substitute For Joinder.*

An unexercised right to intervene voluntarily in private litigation has never been considered the equivalent, for purposes of *res judicata*, of having been made a party. *Chase National Bank* v. *City of Norwalk*, 291 U.S. 431 (1934); *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105 (1918). Prior to the decision of the court below, no court had ever suggested that the possibility of intervening as a defendant could serve as a substitute for joinder in agency adjudications.

The perniciousness of any such doctrine clearly appears from the record in this case. The right to intervene before an agency such as the Federal Trade Commission is an equivocal and uncertain right when the agency has no rules permitting intervention as of right or defining the scope of intervenors' participatory rights. *See* Federal Trade Commission Rules of Practice § 3.41(c), 16 C.F.R. § 3.41(c) (1972). There is no assurance (the assumptions of the majority below notwithstanding) that intervenors before the FTC will be granted the same fundamental procedural rights they would have as parties, such as the right to appeal rulings by the Examiner to the full Commission, a right which the FTC rules accord only to parties. Federal Trade Commission Rules of Practice § 3.52(a), 16 C.F.R. § 3.52(a) (1972).

The vice of relying on absent parties to intervene to protect their interests is compounded in this case because the bottlers have been afforded no notice of the FTC proceeding in the constitutional sense. The Commission has never taken a single step formally to apprise the bottlers of their "right" to intervene or of the existence of the proceeding in which that "right" purportedly exists. Adequate notice presupposes something more than a suspicion that the proceedings may have been reported to the bottlers by the named respondent, an intervening party[51] or the industry press. *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928).

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[51] The Association, of course, did not intervene as a class representative, and it could scarcely serve in that capacity in light of the "Handicap" and the conflicts of interest which that provision has created among the Association's membership. Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Hansberry v. Lee, 311 U.S. 32 (1940).

As this Court stated in *Walker* v. *City of Hutchinson*:

> "There is nothing peculiar about litigation between the Government and its citizens that should deprive thoes citizens of a right to be heard. * * *" (352 U.S. at 117).

The bottlers have had *no* right to be heard in a proceeding before an agency which not only refuses to make them parties but even begrudges them "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. at 314.

B. *The Bottlers' So-Called Right of Appeal Is Not a Substitute for Joinder.*

The attenuated right of appeal postulated for bottlers by the court below should not affect the Commission's obligation to join the bottlers Any right that bottlers might have to review, whether by intervening in an appeal by PepsiCo or by filing suit in a district court under the Administrative Procedure Act in the event that PepsiCo does not appeal, cannot be considered the equivalent of the right to appeal from a proceeding in which bottlers have been parties from the beginning. The effectiveness of judicial review, either on direct review or under § 10(e) of the APA (now 5 U.S.C. § 706), hinges on the record developed in the administrative proceedings. There is no guarantee that the bottlers will have a fair or meaningful opportunity to participate in the creation of that record unless they are joined as parties.

III.

The Holding Below, Giving All Absent Bottlers Rights To Intervene And/Or Separate Rights Of Review As "Aggrieved Persons", Would Paralyze The Judicial System Without Any Compensating Benefits To The Administrative Process.

The court below reasoned that a binding judgment depriving absent persons of property rights can be entered in any agency proceeding as long as the absent persons possess both a right to intervene and a right to appeal. As demonstrated in Points I and II, *supra,* this rationale is so palpably incorrect and entails such potential for abuse that this Court should grant certiorari solely to repudiate it. But even if this Court were not convinced of the enormity of this error, it should grant the petition in order to consider whether the lower court's substitution of a right of appeal for the right of joinder might not have a paralyzing effect on judicial review of administrative agency action.

Under the Federal Trade Commission Act and the statutes of most federal agencies, named respondents can appeal as of right *only* to a single court of appeals. *See* Federal Trade Commission Act § 5(d), 15 U.S.C. § 45(d). The court below, however, has extended to every bottler (as an aggrieved person under 5 U.S.C. § 702) a separate right to review FTC orders, presumably in whatever district court he chooses. The burdens which would be imposed on the judicial system by this substitute for due process more than offset any theoretical gain in efficiency that might result from proceeding without the bottlers.

Moreover, under the decision of the court below, there are *no* administrative gains to be realized, even in the

short run, from failing to join absent persons who have been found to be indispensable parties; under that decision all such persons must be permitted to intervene with substantially all the rights they would have, had they been joined as parties initially.[52] If 513 *Pepsi-Cola* bottlers may freely intervene and participate in the FTC hearings, as the court below decreed, management of those hearings would be no more difficult than if those 513 bottlers had been joined as parties respondent.

Perhaps the court below was gambling that, either through inertia or ignorance of the consequences, bottlers would not intervene in such numbers. Due process, however, should not turn on whether small businessmen are sufficiently aware of the intricacies of complex antitrust proceedings to determine that they must intervene in them in order to protect their property rights.

The only efficient method of assuring that the bottlers will be accorded due process and that those proceedings will ultimately result in one final judgment is to require that the indispensable absent bottlers be joined as parties.

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[52] "* * * [A] proceeding conducted under such restriction [those that could be permissibly placed on bottlers joined as respondents] would not differ essentially from what can be accomplished through intervention * * *." 18a (majority opinion).

IV.

Delay In Making A Final Determination Of The Threshold Question Of "Who Are The Proper Defendants" Would Be Contrary To The Public Interest.

The decisions of this Court establish that early judicial review is appropriate, and indeed manifestly in the public interest, on fundamental issues of subject matter jurisdiction and due process of law which could obviate futile or unjust administrative proceedings. *E.g., Parisi* v. *Davidson*, 405 U.S. 34, 37-38 (1972); *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922). The question whether bottlers must be joined before they can be bound by an order in the FTC proceeding is such an issue.

In the absence of immediate review by this Court, years of litigation before the FTC could result in yet another "20th-century sequel to *Bleak House*", *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 93 S.Ct. 647 at 663 (1973) (Burger, C.J., dissenting)—a final cease and desist order which proves not to be final at all but is subsequently ruled a nullity because of the FTC's failure to join the bottlers or which is held not to bind some or all bottlers.

Courts in other circuits may disagree with the decision of the court below and permit the absent bottlers to litigate *de novo* the issues which the FTC seeks to resolve.[53] A failure to resolve this issue now, at the threshold of the litigation, could involve the same unnecessary investment of "untold efforts and vast expense" as was involved in the

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[53] *See, e.g.*, Coca-Cola Co. v. FTC, 1973 Trade Cas. ¶ 74,360 at 93,678 (5th Cir. 1973): "* * * If plaintiffs eventually prevail on review of the final order and it is necessary to begin anew with Commission proceedings, it will not be the first time events [have] taken that course. * * *"

TWA case, 93 S. Ct. at 662. Such a result would not only run contrary to public policy for the reasons stated therein, but would also be injurious to the public interest in preserving small businessmen.[54]

A decision by the FTC which purports to abrogate bottlers' contract rights could, without more, precipitate a de facto restructuring of the soft drink industry. Large bottlers, armed with such a ruling (albeit interim and erroneous) could nevertheless take marketing actions which would destroy neighboring small bottlers. A subsequent decision holding that the FTC decree is a nullity or is not binding on absent bottlers would be a cruel irony to the bottlers most adversely affected by the FTC proceeding. Where this kind of threshold question arises in a case involving an entire industry and affects the property rights of more than 2700 independent businessmen, the issue is clearly one of national significance, and its prompt resolution is required in the public interest.

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[54] "* * * Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other. * * *" United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) (L. Hand, J.).

CONCLUSION

The opinion of the court below is at odds with the most basic requirements of procedural due process established by the decisions of this Court. The question whether, for its own supposed convenience, an administrative agency can be allowed to rewrite the contracts of absent persons and impose new obligations upon them is one of national importance. The petition for a writ of certiorari should accordingly be granted.

Respectfully submitted,

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